Filed 7/29/20 Roe 1 v. Doe 2 CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN ROE 1 et al., Plaintiffs and Respondents, v. DOE 2, SUPERVISORY ORGANIZATION et al., Defendants. NONPARTY DOES 1-7, Appellants.	G057684 (Super. Ct. No. 30-2014-00741722) ORDER MODIFYING OPINION; DENYING REQUEST FOR REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed herein on July 29, 2020, be modified as follows:

(1) On page 25, the last sentence of the first full paragraph starting with "We order counsel to pay sanctions . . . is deleted and replaced with the following sentence: "We order Appellants' counsel, Robert D. Crockett, to pay sanctions in the amount of $25,452 to Plaintiffs for filing this frivolous appeal/writ."

(2) On page 25, the third sentence of the disposition starting with "Appellants/petitioners' counsel shall pay . . ." is deleted and replaced with the following

sentence: "Robert D. Crockett shall pay $25,452 to Plaintiffs as a sanction for bringing this frivolous appeal."

(3) On pages, 15, 19, 21, 22, 24 and footnote 5 (p. 23) correct a grammatical mistake by replacing the word Member's with Members' where necessary.

This modification does not change the judgment.

Robert D. Crockett's petition for rehearing, filed July 14, 2020, is DENIED.

On July 14, 2020, Brian D. Walter filed a letter asking this court to exclude him from any ordered sanctions in this appeal. His request is granted, as reflected in this order modifying the opinion to state only Robert D. Crockett is ordered to pay sanctions.

Brian D. Walter submitted an untimely petition for rehearing on July 16, 2020, 17 days after the opinion was filed, which was marked "Received" but not filed. Pursuant to California Rules of Court, rule 8.268, a petition for rehearing may be filed within 15 days after the filing of the decision, which, in this case, would have been July 14, 2020. Although the presiding justice may relieve a party from failure to file a timely petition for good cause, in this case no good cause has been shown. Accordingly, the clerk of this court is directed to reject the petition for rehearing for filing as untimely.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

GOETHALS, J.

Filed 6/29/20 Roe 1 v. Doe 2 CA4/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN ROE 1 et al., Plaintiffs and Respondents, v. DOE 2, SUPERVISORY ORGANIZATION et al., Defendants. NONPARTY DOES 1-7, Appellants.	G057684 (Super. Ct. No. 30-2014-00741722) O P I N I O N

Appeal from an order of the Superior Court of Orange County, John C. Gastelum, Judge. Appeal dismissed and petition denied. Motion for sanctions granted.

Crockett & Associates, Robert D. Crockett, Brian D. Walters, Jackie K. M. Levien, and Chase T. Tajima for Appellants.

The Zalkin Law Firm, Irwin M. Zalkin and Devin M. Storey; Pine Tillett Pine, Norman Pine and Scott Tillett for Plaintiffs and Respondents.

* * *

John Roe 1 and John Roe 2 (Plaintiffs) alleged Doe 3 sexually abused them. Plaintiffs filed a lawsuit against Doe 3 (the Perpetrator) and "Doe 2, [the] supervisory organization" (Watchtower). They maintained Watchtower was liable for, among other things, negligently hiring, retaining, and supervising the Perpetrator. In 2017, Plaintiffs demanded production of documents relating to Watchtower's awareness of child molestations by its members. Specifically, Plaintiffs' discovery request sought information relating to Watchtower's efforts in 1997 to collect reports from each congregation of Jehovah's Witnesses in the United States about child molestations involving their members (Molestation Files). Watchtower does not believe this information is discoverable. In May 2018, the trial court disagreed and ordered Watchtower to produce the Molestation Files with specific redactions and under a protective order limiting the use and dissemination of the information.

However, this appeal does not concern the discovery dispute between Plaintiffs and Watchtower. After the court made it's ruling in May 2018, Watchtower did not file a motion for reconsideration or a writ petition. Rather, this appeal concerns a group of congregation members who filed a motion to modify the May 2018 discovery order. Does 1-7 (the Members) are nonparties who fear information contained in the Molestation Reports concerns them and disclosure will harm their families if the facts are no longer kept confidential. The court determined the request for a protective order was an improper motion for reconsideration of the May 2018 order and was also untimely.

In this appeal, the Members raise many of the same issues set forth by Watchtower in its protective order (privacy rights and priest-penitent privilege) and they also maintain the court's procedural basis for denying relief lacked merit. Plaintiffs filed a motion to dismiss the appeal, and while we agree the ruling was nonappealable, we will treat the appeal as a writ petition in an effort to put an end to further interference in this

action. We deny the petition and grant Plaintiffs' motion for sanctions. The Members' counsel must pay $25,452 to Plaintiffs as a sanction for bringing this frivolous appeal.

FACTUAL SUMMARY

I. *Underlying Action*

In 2014, Plaintiffs filed a complaint alleging they were molested as children during Bible study sessions in an Orange County congregation of the Jehovah's Witness Church. The complaint alleged Watchtower, located in Brooklyn, New York, was "the highest level of Jehovah's Witness governance, and is responsible for administration of the Jehovah's Witness Church worldwide, including operations in California." They alleged the Perpetrator held various leadership positions within the Orange County congregation and "was under the direct supervision, employ, and control of" the congregation and Watchtower. The complaint alleged causes of action for negligence, negligent supervision/failure to warn, negligent hiring/retention, negligent failure to warn, train or educate Plaintiffs, and sexual battery.

The complaint outlined the hierarchical nature of the Jehovah's Witness Church. It alleged Watchtower was directed by a governing body of "Elders," who published and distributed handbooks to local congregations. These documents contained instructions about administrative matters such as discipline. Watchtower also sent letters to local congregations, addressed to "All Bodies of Elders." A "Body of Elders," the numbers of which fluctuated depending on the size of the congregation, operated each congregation.

Relevant to this case, "Congregants [were] encouraged to bring problems to the Elders to be resolved rather than to seek intervention from outside of the Jehovah's Witness Organization. In practice, when a Congregant commits an act of wrongdoing, such as the sexual abuse of a child, that matter must be brought to an Elder to be resolved." Elders were required to investigate the matter, and if there were two witnesses

or if there was a confession, the matter would be sent to a "Judicial Committee." Otherwise, no further action was taken.

On December 2017, one of the plaintiffs requested information from Watchtower's Molestation Files. Specifically, Plaintiffs sought a collection of reports, generated by the Elders in all United States Jehovah's Witness congregations, in response to Watchtower's March 14, 1997, letter to "ALL BODIES OF ELDERS" (1997 Letter). The letter discussed the "unwholesome practice[]" of child molestation, defined the term child molester, and stated what Elders could do to help protect children. It also stated, "[T]he body of elders should discuss this matter and give [Watchtower] a report on anyone who is currently serving or who formally served in a Society-appointed position in your congregation who is known to have been guilty of child molestation in the past." The Elders were asked to answer a long list of questions, ranging from "How long ago did he commit the sin?" to more complicated issues of whether the molester moved to another congregation and how the new congregation was notified. "If you have not advised them, this should be done now, and you should send a copy of your letter to the Society in the 'Special Blue' envelope."

Plaintiffs demanded production of "[a]ll letters, e-mails, facsimiles, or other documentary, tangible, or electronically stored information of any kind, Watchtower . . . received in response to" the 1997 Letter (Demand for Production No. 18 or "request 18"). Plaintiffs also more generally demanded production of "[a]ny and all individual written accounts, reports, summaries, letters, e-mails, facsimiles, and records, whether or not compiled, concerning reports of sexual abuse of children by members of the Jehovah's Witnesses . . . from the time period of 1979 to the present" (Demand for Production No. 19 or "request 19").

Watchtower filed a protective order, asserting the information was not discoverable due to the clergy-penitent privilege, third party privacy issues, and the First Amendment. Watchtower rejected Plaintiffs' offer to accept Molestation Files with

redacted names of the molestation victims and the elders who wrote the documents. Plaintiffs (who were sexually abused in the early to mid-1990's) were also willing to narrow the focus of their discovery request to documents dated between 1989 and 2001. Plaintiffs were aware several appellate courts approved and adopted similar third party protective measures when creating protective orders regarding the Molestation Files in other child molestation cases against Watchtower. (See *J.W. v. Watchtower Bible & Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142 (*J.W.*); *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246 (*Padron*); *Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566 (*Lopez*); collectively referred to as the "Watchtower Cases.")

In the last section of its motion for a protective order, Watchtower stated it would produce documents in response to request 19 "subject to a protective order that allows Watchtower to redact all victim and third party identifying information (including names of congregations, victims, elders, witnesses, and alleged perpetrators) and to replace that information with pseudonyms composed of letters and numbers ascribed to each third-party" (Pseudonym Procedure). It also proposed to limit the scope of request 19 to the three years the abuse allegedly occurred (1994-1997) and only produce documents sent from California's congregations. It asserted out-of-state documents from any other time period would not have any probative value.

II. *Court's May 2018 Protective Order*

On May 17, 2018, the trial court issued a lengthy minute order regarding Watchtower's motion for protective order. With respect to request number 19, the court granted the request "in part" and limited document production to the following terms: "(1) redaction of personally-identifying [*sic*] information for alleged third-party victims and third-party participants; (2) a protective order to govern use of such documents (i.e., use and dissemination is limited for purposes of this litigation only); and (3) a limited

scope of time from 1989 to 1999." It imposed similar restrictions with respect to the documents relating to request 18.

In August 2018, Watchtower produced a heavily modified version of the original Molestation Files and implemented the Pseudonym Procedure rejected by the court. On August 22, 2018, Plaintiffs' counsel wrote Watchtower an e-mail stating the recent production of documents in response to requests 18 and 19 did not comply with the court's May 2018 order. In response, Watchtower's counsel admitted, "Watchtower is aware that the redactions do not conform to the letter of the [o]rder." Counsel asserted Watchtower was "making every effort to substantially comply with the order" and believed "its production [was] consistent with the spirit of the [o]rder."

III. *Nonparties Object*

After Watchtower produced the heavily redacted Molestation Files, a group of six Jehovah's Witness congregation members filed a complaint in federal court "for violation of civil rights." The complaint, filed August 23, 2018, stated the suit was filed by "members of some of the congregations of Jehovah's Witnesses that supplied the documents at issue in the [s]tate [l]itigation" and "[e]ach one of them is named, identified, or described in the documents that must be produced" and they "face[] serious risk that their privacy will be violated" if the documents were not redacted according to the Pseudonym Procedure. The six litigants were either abuse victims, or parents of children claiming abuse. They asked the federal court to enjoin the superior court from enforcing the May 2018 order. On January 14, 2019, the federal court dismissed the case without prejudice.

Meanwhile, on September 28, 2018, the six Jehovah's Witness congregation members (Does 1-6) and an "elder" (Doe 7), filed in superior court a motion for a protective order. They moved "on behalf of themselves and other similarly situated persons" for the court to modify its May 2018 order "to exempt and recall from production documents mentioning [them] or their family members" or "to exempt all

documents with clergy-penitent communications from production and permit complete redaction of all information that could lead to the identification" of the moving parties. Citing to Code of Civil Procedure section 2031.060, subdivision (a),[1] the Members asserted any affected person may move for a protective order against a demand. They noted, "The court, for good cause shown, may make any order that justice requires to protect any party *or other person* from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (§ 2031.060, subd. (b), italics added.)

Plaintiffs opposed the motion, arguing the motion was a procedurally improper motion for reconsideration, as well as an untimely filed motion for a protective order. They argued the Members were collaterally estopped from raising the same claims decided in the *Lopez* and *Padron* decisions. Moreover, Plaintiffs asserted the Members lacked standing to pursue the claims of other people similarly situated. Finally, they asserted the Members failed to meet their burden of establishing the application of clergy-penitent privilege or that the privacy rights of third parties were inadequately protected by the existing protective/redaction order.

In March 2019, the trial court considered the Members' motion for a protective order at the same hearing as Plaintiffs' motion for sanctions against Watchtower for failing to comply with the May 2018 order to produce the Molestation Files. The court agreed the motion was an improper motion for reconsideration of the May 2018 order. (§ 1008.) The court reasoned as follows: "Although Non Party Does have filed a 'Motion for Protective Order," this is actually a [m]otion for [r]econsideration of the [May 2018] ruling. The name of the motion is not controlling. [S]ection 1008 requirements apply to any motion that asks the judge to decide the *same matter* previously ruled on. [Citations.] In essence, [the Members] ask this [c]ourt to allow further redactions beyond what the [c]court ordered on [May 17, 2018], i.e., asking

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

this [c]ourt to decide the same matter previously ruled on. As such, [the Members] may only make such a request pursuant to . . . section 1008; and thus, this motion for protective order is improper."

The court rejected the Members' argument they were not seeking reconsideration because they did not receive notice of the May 2018 ruling. The court noted there was a precedent where nonparties filed their motion for reconsideration six years after the original proceedings and the motion was deemed timely. The court concluded the "only vehicle by which" the members could challenge the May 2018 order was a motion for reconsideration setting forth new or different facts, circumstances, or law, and they failed to bring the right motion. The court concluded it lacked jurisdiction to rule on the Members' motion for a protective order under section 1008, subdivision (e). The court added that if it had jurisdiction it would reach the conclusion stated in the May 2018 ruling "for the same reasons expressed there."

Alternatively, the court ruled the motion failed because it was not promptly filed as required by section 2031.060, subdivision (a). The court noted the Members hired counsel in July 2018 and they filed an action in federal court to halt enforcement of the May 2018 order. The court opined, "Bringing this motion [four] months after [the May 2018] order and [two] months after hiring counsel, [was] not prompt."

The court continued the motion for sanctions to May 14, 2019. It ordered Plaintiffs' counsel to file an updated supplemental declaration setting forth the fees and costs incurred to bring the motion. The court stated it was inclined to grant the motion for sanctions if Watchtower failed to comply with the May 2018 order nine days before the May 14, 2019, hearing.

Approximately one week before this deadline, on May 3, 2019, the Members filed this appeal as well as a request to stay enforcement of the discovery order. The trial court imposed a partial stay and vacated the hearing on Plaintiffs' motion for sanctions while this appeal is pending.

Plaintiffs filed a motion to dismiss the appeal and requested sanctions. They argued the Members lacked standing to appeal, the order was nonappealable, and alternatively the substantive issues raised lacked merit.

DISCUSSION

The Members contend the court erred in denying their motion to reconsider the May 2018 protective order, which they call a motion for a protective order. While Plaintiffs address the merits of the Members' arguments, they filed a motion to dismiss the appeal asserting the Members not only lacked standing to appeal, but also the appeal was based on a nonappealable order. We begin our analysis by deciding this basic jurisdictional question.

I. *Jurisdiction*

"'Any party aggrieved' may appeal from an adverse judgment. (§ 902.) It is generally held, however, that only parties of record may appeal. [Citations.]" (*Bates v. John Deere Co.* (1983) 148 Cal.App.3d 40, 53.) After reviewing the trial court's lengthy minute order, it appears the issue of the nonparties' standing was not specifically litigated, however, we can infer the court considered the issue of jurisdiction because it concluded it lacked authority to consider the matter unless it was treated as a motion for reconsideration (§ 1008). The trial court ruled a section 1008 motion was the only way a nonparty could seek modification of a prior discovery order. The Members assert this ruling was incorrect because they never filed a motion for reconsideration. Rather, the Members maintain they had the absolute right to bring a motion for a protective order because they were not parties to the motion to compel that resulted in the May 2018 protective order. Recognizing they lack custody or control of the documents at issue, they assert that "as the holders of the privileges and privacy rights, they were entitled to move for a protective order to do so and have standing to appeal the March 29, 2019, order denying that protective order." As we explain in more detail below, regardless of

what we call the motion, the Members defied all legal authority and appealed from a nonappealable order.

A. *Motion for Reconsideration-Nonappealable*

Contrary to their contention on appeal, the trial court correctly determined Members had standing to bring a motion for reconsideration. Section 1008, subdivision (a), provides "any party affected" by a court's order can file a motion for reconsideration of that order. There is well established case authority recognizing that in limited circumstances, a nonparty can file a motion for reconsideration. (*Wilson v. Science Applications Internat. Corp.* (1997) 52 Cal.App.4th 1025, 1032-1033 (*Wilson*) [nonparty could file motion to reconsider order sealing court records].)

Whether the motion is filed by a party or nonparty, it is also well settled that "once a lawful order has been entered by a trial court, its power to alter or reconsider that order is, in the interests of bringing finality and reliability to the administration of justice, somewhat constrained. [Citation.]" (*Wilson, supra,* 52 Cal.App.4th at p. 1031.) "By making section 1008 expressly jurisdictional, the Legislature clearly intended to prevent courts from modifying, amending or revoking priors orders without due reconsideration." (*Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485, 492-493.) Thus, any party seeking to alter a prior order must satisfy the requirements of section 1008, subdivision (a), and set forth new or different facts, circumstances or law that justify a different result. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) A nonparty who brings a motion for reconsideration must also comply with the requirements except for the 10-day deadline. (*Wilson, supra,* 52 Cal.App.4th at p. 1031 [nonparty not served with the order could file motion six years after order entered].)

The Members also fail to acknowledge case authority holding, "The name of a motion is not controlling, and, regardless of the name, a motion asking the trial court to decide the same matter previously ruled on is a motion for reconsideration under . . .

section 1008. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 9:324.1, p. 9(I)-124.)" (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577 (*Powell*).) Such was the case here. The trial court appropriately treated the Members' request as a motion for reconsideration because the movants simply wanted the trial court to decide again whether the Molestation Files were discoverable and reconsider Watchtower's argument there must be additional redactions. Accordingly, the trial court correctly determined the only way it could alter the May 2018 order was if a party or nonparty filed a motion for reconsideration. Failing to acknowledge the above case authority, it is not surprising the Members make no attempt to argue they presented new or different facts, circumstances or law warranting a different protective/discovery order.

In a footnote, the Members make the simple and legally unsupported assertion that "[t]o the extent section 1008[, subdivision] (a), applied to [the Members], they complied with its provisions." "It is the responsibility of the appellant . . . to support claims of error with meaningful argument and citation to authority. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

The Members do not attempt to argue the ruling denying a motion for reconsideration was appealable. This court has previously sided with the prevailing view that "an order denying a motion for reconsideration is not appealable, even when based on new facts or law. [Citations.]" (*Powell, supra,* 197 Cal.App.4th at pp. 1576-1577.) The majority of courts have "'concluded that orders denying reconsideration are not appealable because "[s]ection 904.1 . . . does not authorize appeals from such orders, and to hold otherwise would permit, in effect, two appeals for every appealable decision and promote the manipulation of the time allowed for an appeal."' [Citation.]" (*Ibid.*)

Because we lack jurisdiction to review the ruling, Plaintiffs are correct the appeal from a reconsideration order should be dismissed.

For reasons described anon, we will treat the appeal as a writ petition. However, we have included the above discussion because no reasonable attorney would appeal from the denial of a motion for reconsideration and neglect to present legal discussion about the ruling. As we will address in our discussion about sanctions, the Members failed to acknowledge or attempt to distinguish case precedent that the name of a motion is not controlling or that the denial of a motion for reconsideration is nonappealable. (*Powell, supra,* 197 Cal.App.4th at p. 1577.)

B. *Protective Order Under Section 2031.060-Nonappealable*

We recognize the Members could theoretically have standing to bring a motion for a protective order under section 2031.060, subdivision (a), in the trial court. When there has been a demand for documents, section 2031.060 permits "the party to whom the demand has been directed, and any other party or affected person" to "*promptly* move for a protective order." (Italics added.) The court has authority to make any protective order "that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (§ 2031.060, subd. (b).) Simply stated, nonparties who are "affected persons" have standing to interrupt the proceedings and move for a protective order but, for obvious reasons, must "promptly" do so.

In this case, the Members did not seek a new protective order. Rather they sought to overturn/modify a prior court order denying in part Watchtower's motion for a protective order. As mentioned, Watchtower's protective order sought to protect the privacy rights of third parties mentioned in the Molestation Files. In light of these circumstances, it is unclear why section 2031.060 should apply. The Members do not address this issue in their briefing.

Without deciding the issue, we will assume for the sake of argument that the Members had standing to bring what was essentially a second motion for a protective order seeking the same relief as Watchtower's motion. The issue of standing becomes irrelevant because the ruling was not appealable. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2020) ¶ 15:42.)

In filing this appeal, the Members have ignored the most basic rules of appellate procedure regarding the review of discovery orders. It is difficult to imagine how an attorney could be unaware of the large body of legal authority, including Supreme Court decisions, holding discovery orders are nonappealable. It appears counsel may have been aware the appeal could be dismissed, but by filing the appeal, he achieved a one year stay of the May 2018 discovery order, and postponed a sanctions hearing.

The following is a discussion of well settled case authority limiting this court's ability to review discovery orders. "Generally, orders pertaining to discovery are reviewable only on appeal from a final judgment in the action. In the interests of expediting trial of the action (one of the fundamental purposes of the Civil Discovery Act), discovery rulings usually are not directly reviewable by appeal or writ of mandate [citations.] 'Writ proceedings are not the favored method for reviewing discovery orders because typically the delay caused by such review results in greater harm than in the enforcement of an improper discovery order' [citation]." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 15:42.) Only in "exceptional circumstances" can a party obtain review of an interim discovery order by filing a petition for writ of mandate. (*Ibid., see also Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185, fn. 4 (*Oceanside*).)

While we have the power to treat the Members' appeal as a writ petition, "we should not exercise that power except under unusual circumstances." (*Olson v. Cory* (1983) 35 Cal.3d 390, 401.) Sixty years ago our Supreme Court explained, "the parties must be relegated to a review of the order on appeal from the final judgment. As

inadequate as such review may be in some cases, the prerogative writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases." (*Oceanside, supra,* 58 Cal.2d at p. 185, fn. 4.)

There is also well-settled case authority regarding the types of exceptional circumstances warranting immediate review. The cases typically involve situations where an order denying discovery was clearly an abuse of discretion or where an order granting discovery would effectively undermine a privilege or privacy rights. In those types of cases, review by appeal from the judgment would be deemed "inadequate" because a reversal on appeal could not cure the prejudicial disclosure of privileged information. (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1031 (*Petaluma*).)

In this case, the Members are asserting the discovery order concerns both privileges and constitutional privacy rights. An appeal following a final judgment does not offer an adequate remedy because there is no way to undo the harm resulting from the disclosure of privileged materials. (*Petaluma, supra,* 248 Cal.App.4th at p. 1031.) Writ review would be appropriate. Although this case arises out of a rather unusual situation, where nonparties have inserted themselves into an ongoing discovery dispute between molestation victims and Watchtower, the nature of the order is easy to identify. Due to the harm caused by delaying litigation, the only avenue to seek review of this discovery ruling was by filing a petition for writ of mandate. Yet the Members filed an appeal.

In their opposition to the motion to dismiss, the Members assert this court has the option of treating their appeal as a petition for a writ. Relying on the *Oceanside* doctrine, the Members maintain there are "exceptional circumstances" justifying writ review. (*Oceanside, supra,* 58 Cal.2d at p. 185, fn. 4.) However, the same footnote in the *Oceanside* case explains discovery orders must be appealed from the final judgment (not from the discovery order). (*Ibid.*) Our Supreme Court clearly stated review of

discovery orders was limited to those two options.[2] Ignoring this Supreme Court precedent, the Members rely on *Brun v. Bailey* (1994) 27 Cal.App.4th 641 (superseded by amended statute on other grounds) to support their theory they had standing to appeal and the order was an appealable collateral order. Their reliance on this case is misplaced.

In *Brun*, a nonparty chiropractor moved for a protective order compelling expert witness fees for his deposition testimony. (See § 2025.420, subd. (a) [authorizing any "affected" person to move for protective order before, during, or after deposition].) The court stated, "Although, technically, an order denying a motion for a protective order compelling the payment of an expert witness fee is an order arising during discovery, the rationale for making discovery orders nonappealable does not apply to such an order, which is more accurately characterized as a collateral order akin to a final judgment." (*Brun, supra*, 27 Cal.App.4th at p. 648.) It reasoned, "'"A necessary exception to the one final judgment rule is recognized where there is a final determination of some collateral matter distinct and severable from the general subject of the litigation. If, e.g., this determination requires the aggrieved party immediately to pay money or perform some other act, he is entitled to appeal even though litigation of the main issues continues. Such a determination is substantially the same as a final judgment in an independent proceeding. [Citations.]"' [Citation.]" (*Ibid.*) The Members cite *Brun* as authority holding any nonparty filing a motion for a protective order becomes a party to the action and has standing as an aggrieved party to file an appeal. They misconstrue the holding.

We begin with the Member's assertion *Brun* held a nonparty becomes a litigant for all purposes by filing a protective order. This was not an issue decided in the *Brun* case. Indeed, that court only considered whether the nonparty had standing to file

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[2] Having read and cited to the *Oceanside* case, clearly the members understood they lacked authority to appeal directly from an adverse discovery ruling. This is yet another example of ignoring well-established case authority relevant to our sanctions discussion, anon.

the appeal on a collateral matter. It ruled as follows: "In this case, [the discovery statute], authorizes appellant's motion for a protective order requiring defendant to pay appellant an expert witness fee. By bringing the motion, appellant became a party to the proceeding *on his motion* to obtain an expert witness fee. He, therefore, has standing to appeal. The fee issue is a collateral matter distinct and severable from the general subject of the underlying litigation." (*Brun, supra*, 27 Cal.App.4th at p. 650, italics added.) In other words, the court concluded the nonparty became a party to a lawsuit "on his motion" but not for all purposes.

We found no case authority or legal basis to consider the Members as a party in Plaintiff's lawsuit. They have not filed a motion to intervene. (*Gray v. Begley* (2010) 182 Cal.App.4th 1509, 1521 [way for nonparty to acquire appellate standing in lawsuit]). Other steps a nonparty can take to gain standing are not applicable in this case. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 2:276 [listing procedures for nonparty to become a party, such as filing motion to vacate judgment, judgment notwithstanding the verdict, or motion for new trial].)

The Members assert the *Brun* case also supports their theory the court's order was on a distinct collateral matter. Not so. The Members are not appealing from a discovery order remotely comparable to an order regarding the deposition fees of a nonparty. Rather, we have a case where nonparties inserted themselves into an ongoing discovery dispute between the litigants, disrupting the case for over a year, without officially intervening in the action. Discovery of the Molestation Files was a main issue in the case, affecting the interests of the Plaintiff and Watchtower.

The rules on this issue are well established as follows: "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citations.] This constitutes a necessary exception to the one final judgment rule. Such a determination is substantially

the same as a final judgment in an independent proceeding. [Citations.]" (*In re Marriage of Skelley* (1976) 18 Cal. 3d 365, 368.)

The Members assert the ruling left no issue remaining as to them, and their interests are not the same as Watchtower's. This is not the applicable test, and in any event, it ignores that the ruling represented the court's refusal to change an *order compelling Watchtower* to produce documents. While the Members can assert their interests differ from Watchtower, they cannot change the fact that the nature of the ruling related directly, not collaterally, to a different party in the case. Any appellate opinion regarding the March 2019 discovery order will directly impact not just the Members, but also what evidence the litigants can use at trial. Indeed, the order cannot be considered collateral because Watchtower, who is not a party in this appeal, would certainly argue it need not comply with any adverse decision regarding its obligation to produce documents. Recognizing this potential outcome, the trial court agreed to stay the lawsuit until this appeal was resolved. Finally, the order does not direct the Members to pay money or perform an act from which a direct appeal may be taken. As aptly pointed out by Plaintiffs, the Members have not suffered any immediate consequences from the March 2019 order because Watchtower has refused to produce the Molestation Files.

We also reject the Members' assertion their "motion, though styled as one for a protective order and viewed by the [court] as a motion for reconsideration, it was in practical effect, a motion for an injunction to prevent the further review of the privileged documents by [the] Plaintiffs and to require the documents be pulled back from the production." The Members assert that by "denying the motion for protective order, the [court] refused to grant an injunction; such refusal is appealable pursuant to . . . section 904.1(a)(6)." Not so.

First, as recognized by the Members, their notice of appeal was filed from a "collateral final order." They did not check the box stating the appeal was from the denial of an injunction. Second, the Members did not seek injunctive relief or establish

any of the legal criteria for issuance of an injunction. (See, e.g., *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1047.) This dispute arises from the Plaintiffs' efforts to compel Watchtower to produce discovery. The Members inserted themselves into this dispute via a protective order brought under a discovery statute, section 2031.060, subdivision (a). The court's order was not granted as part of an injunction, but rather as discovery. "To the extent this mandates action by [Watchtower (not the Members)]" the order is not part of an injunction, "but derives from separate statutory authority." (*Oiye, supra,* 211 Cal.App.4th at p. 1048.)[3]

C. *Reasons Why We Will Treat This Appeal as Writ Petition*

The Members, who have ignored case authority stating the only way to seek review of the court's order was via a writ petition, have effectively stalled Plaintiffs' efforts to enforce the May 2018 discovery order for over a year. While we are reluctant to reward this behavior, we have decided to treat this appeal as a writ petition because we perceive the need to put an end to this matter so the case can get back on track in the lower court. (See *Green v. GTE California, Inc.* (1994) 29 Cal.App.4th 407, 408 [decision to treat attempted appeal from nonappealable discovery sanctions order as writ petition because "No court should have to review these facts again"].) In this opinion, we clarify steps the Members and other nonparties in the future must take, rather than filing a

[3] We note the Members assert we must review the court's ruling de novo based on this meritless theory they sought an injunction, not a discovery order. Consequently, their briefing does not apply the correct standard of review for discovery orders and protective orders, i.e., abuse of discretion. (*Petaluma, supra,* 248 Cal.App.4th at p. 1031.)

protective order, to become a party for all purposes in this litigation.[4] Moreover, if different nonparties wish to insert themselves into this action seeking additional protective orders, they are advised to follow the rules and seek review via a writ petition. Any further appeals in this case from discovery orders will be promptly dismissed.

III. *Review of the Petition for Writ of Mandate*

Turning to the merits of the writ petition, we find no reason to set aside the trial court's ruling denying the protective order. "We apply the abuse of discretion standard in reviewing discovery rulings. [Citation.] A court abuses its discretion when it applies the wrong legal standard. [Citation.] '[W]hen the facts asserted in support of and in opposition to the motion are in conflict, the trial court's factual findings will be upheld if they are supported by substantial evidence.' [Citation.] However, we apply independent review to the trial court's conclusions as to the legal significance of the facts. [Citation.]" (*Petaluma, supra,* 248 Cal.App.4th at p. 1031.)

In this case, the trial court stated it would deny a motion for a protective order on procedural grounds. Specifically, it determined the Member's motion for a protective order under section 2031.060 was untimely. As noted above, the statute has an express requirement of promptness. The court concluded the Members hired counsel in July 2018 and then they filed an action in federal court to halt enforcement of the May 2018 order. "Bringing this motion [four] months after [the May 2018 order], and [two] months after hiring counsel, [was] not 'prompt.'"

Neither the Members' opposition to the motion to dismiss nor their opening brief discuss the merits of the court's procedural ruling. The issue of untimeliness was

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[4] In his declaration, Plaintiffs' counsel noted the Members recently filed a response to the trial court's request for briefing on the appointment of a discovery referee. We cannot render an advisory opinion on issues not properly brought before us. However, this opinion hopefully clarifies the Members only became parties to the proceedings on their motion, not for all purposes. (*Brun, supra,* 27 Cal.App.4th at p. 650.)

the primary reason the court gave for denying a motion for a protective order, yet the Members did not assert they moved promptly or that there was good cause for the delay. Instead, they address the merits of their motion; issues the trial court determined were resolved earlier and refused to reconsider.

In their reply brief, the Members assert for the first time the motion was timely because it was filed "within 14 days of the initial production of documents." "They obtained more than a dozen declarations for the court. They obtained an expert. They, who are [a] scattered group of worshipers, were as diligent as one could be under the circumstances." Noticeably absent from the discussion is any explanation as to why the Members failed to address the procedural ruling earlier. We can reasonably infer the decision was a tactical decision, which was foolish. It would be unfair for this court to consider a claim the Plaintiffs were not given any opportunity to address. "[P]oints raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier [citation]." (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583.) This is not a new legal concept. One of the Watchtower Cases, *Padron, supra*, 16 Cal.App.5th at page 1267, discussed this same point, concluding, "[a]ny new substantive arguments raised by Watchtower in its reply brief are deemed forfeited. [Citations.]"

Nevertheless, we will briefly address the merits of the Members' argument because the discussion is relevant to the issue of sanctions discussed anon. The observation the Members' motion was "timely" filed 14 days after Watchtower produced documents is meaningless if viewed in context. Watchtower's production was not only untimely; it knowingly violated the court's order. In addition, the Members' suggestion they could not file the motion earlier because they were scattered and disorganized is belied by the record. On August 23, 2018, the Members' attorney filed a federal lawsuit seeking to enjoin the May 2018 order. The federal complaint was supported by declarations, suggesting much earlier organizational efforts and legal maneuverings had

occurred. The Members offer no reason for why they waited until the end of the following month (September 28, 2018) to file the protective order in superior court. The record amply supports the trial court's conclusion the motion for a protective order (which should have been filed as a motion for reconsideration) was untimely. We find no abuse of discretion.

IV. *Sanctions.*

"[S]ection 907 provides that '[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.' . . . [T]he California Rules of Court similarly provides that '[I]f the appeal is frivolous or taken solely for the purpose of delay . . . the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require.' The California Supreme Court has held an appeal is frivolous 'only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]' (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [(*Flaherty*)].)" (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 31; Cal. Rules of Court, rule 8.276.)

The Member's appeal/writ petition is frivolous under the *Flaherty* standard. The extremely limited scope of review of discovery orders is well established, yet the Members filed an appeal rather than a writ petition. (*Oceanside, supra,* 58 Cal.2d at p. 185, fn. 4.) As discussed throughout this opinion, the Members' counsel raised multiple frivolous assertions both in the opposition to the motion to dismiss and the briefing on appeal. For example, counsel raised meritless arguments regarding the Members' status as parties in the case, jurisdictional issues relating to the nature of the interim order, and the standard of review. One instance, not previously discussed, was the Members' assertion the motion to dismiss must be denied because Plaintiffs did not

submit a separate written motion in compliance with California Rules of Court, rule 8.54(a). To support this claim, Members cited two cases, *Halliburton Energy Servs., Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 106 (*Halliburton*), and *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 565 (*Jocer*). In both of these cases, the party requested dismissal of the appeal *as part of their appellate briefing*. (*Halliburton, supra,* 220 Cal.App.4th at p. 106 [request in footnote of respondent's brief]; *Jocer, supra,* 183 Cal.App.4th at p. 565, fn. 4 [request in respondent's brief].) Although Plaintiffs mention grounds for dismissal in their briefing, they also filed a *separate written motion* in compliance with the rules of court. The Members were clearly aware of this because they filed a *separate written objection to the motion*. On August 9, 2019, this court ordered that the Plaintiffs' motion to dismiss and request for sanctions, and the Member's opposition to these motions would be decided in conjunction with the appeal, not somehow consolidated with the appeal. This argument indisputably lacks merit.

In addition, while we did not need to reach the substantive merits of the Member's appeal, we find it very telling that in their opening brief Members do not cite, much less attempt to distinguish, the Watchtower Cases. These three published cases directly addressed the third party privacy, privilege, and First Amendment claims relating specifically to discovery of the Jehovah's Witnesses' Molestation Files. (See e.g. *Lopez, supra*, 246 Cal.App.4th at pp. 596-599.) In their reply brief, the Members asserted they were not collaterally estopped by the three Watchtower Cases because they were "not in privity" with Watchtower. This argument, however, does not explain why they completely ignored these cases in the opening brief. No reasonable attorney would appeal from a nonappealable discovery order and also not bother to make any attempt to distinguish three published cases holding the Molestation Files were absolutely discoverable (and upholding daily sanctions). And, as noted earlier, the practice of saving arguments for one's reply brief is problematic because it results in forfeiture of the

argument. It is unfair not to give the opposing party an opportunity to respond. (*Padron, supra,* 16 Cal.App.5th at p. 1267.)[5]

Given the facts and controlling legal authority, we believe "any reasonable attorney would agree that th[is] appeal is totally and completely without merit." (*Flaherty, supra,* 31 Cal.3d at p. 650.) The Members' utter failure to follow basic appellate rules regarding review of discovery orders resulted in an unnecessarily long delay of Plaintiffs' case. This unfair delay in combination with their failure to discuss the most pertinent legal authority, or provide any legal analysis using the correct standard of review, leads us to the reasonable inference counsel subjectively prosecuted the appeal for an improper purpose. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra,* ¶ 11:104, p. 11-27 [frivolous nature of appeal provides evidence it was prosecuted for improper reason].)

Further support for this conclusion is our review of the Members' response to the sanction request. Counsel prepared two short and repetitive paragraphs, lacking supporting citations or authority. In a nutshell, counsel asserts Plaintiffs made "vindictive and speculative accusations" regarding counsel and argues these terrible allegations should not mean the appeal seeking constitutional protections was frivolous. We conclude sanctions are warranted against counsel, not due to vindictive accusations, but due to our analysis of the many meritless arguments raised in an appeal we are now treating as a writ petition.

"We are, of course, mindful of *Flaherty's* caution that 'any definition [of a frivolous appeal] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are

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[5] For this reason, we will not consider the Member's two-page argument that stare decisis does not apply with respect to the Watchtower Cases because Watchtower "made only broad" privacy right arguments and have different interests than congregation members. This argument also fails due to the lack of supporting record references and direct legal analysis on the point asserted.

arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions.' [Citation.] However, that limitation has no application here. Under no legal analysis can we conclude that any of [the Member's] contentions are 'arguably correct.'" (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 132 (*Young*).) The Member's conduct was especially egregious because they failed to bring the collection of Watchtower Cases to our attention in their opening brief, and did not attempt to address the weight of this authority until after Plaintiffs cited the cases in their brief. "Where, as here, a party appeals and merely repeats an argument that was soundly rejected by another appellate panel, we have little difficulty concluding that the party lacked good faith in pursuing the appeal." (*Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 193.) We conclude the appeal filed by Crockett & Associates was without merit and brought for no purpose other than to harass Plaintiffs and delay the production of the documents needed to prove their case before a jury.

The above discussion satisfies our duty under *Flaherty* to provide counsel with a written statement of the reasons for the penalty. (*Flaherty, supra,* 31 Cal.3d at p. 654.) We turn now to deciding the amount of sanctions.

"In determining the appropriate relief, the underlying policy of . . . section 907 should control. 'The object of imposing a penalty for frivolous appeal is twofold—to discourage the same, as well as to compensate to some extent for the loss which results from the delay. . . . [¶] In determining the amount . . . in this case for a frivolous appeal we should consider the facts with relation thereto and the effect of the delay.' [Citations.]" (*Young, supra,* 212 Cal.App.3d at p. 135.)

Here, in addition to damaging Plaintiffs by delaying their case, they were forced to incur the cost of preparing documents for this appeal. Plaintiffs' counsel, Devin M. Storey, filed a declaration stating the cost in preparing the motion to dismiss and respondent's brief involved his time (45 hours billed at $400 per hour), plus the

assistance of two appellate counsel hired as consultants for the appeal (billed at $615 for 2.77 hours, and $875 for 6.57 hours). He calculated the total cost was "at least $25,452.30."

As mentioned earlier, the Members' response to the motion was lacking in many respects, not to mention they did not assert the requested amount was unsupported or unreasonable. Based on our review of the record and briefing, a total of 54 hours appears reasonable given the difficulty of the issues and thoroughness of the briefing. We found nothing suggesting the time was unnecessary or reflects overbilling. We order counsel to pay sanctions in the amount of $25,452 to Plaintiffs for filing this frivolous appeal/writ.

DISPOSITION

The appeal having been taken from a nonappealable order, the appeal is dismissed. Having treated this appeal as a petition for a writ of mandate, we deny the petition. Appellants/petitioners' counsel shall pay $25,452 to Plaintiffs as a sanction for bringing this frivolous appeal. The sanction shall be paid no later than 30 days after the remittitur is issued. Plaintiff shall recover costs on appeal. The request for judicial notice is denied because the materials were not needed to resolve the issues in this case.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(3), upon issuance of the remittitur, the clerk is directed to notify the State Bar of the sanctions imposed by this opinion and order. Pursuant to Business and Professions Code

section 6086.7, subdivision (b), the clerk is directed to notify the Members (Appellants/Petitioners) and their counsel that this matter has been referred to the State Bar.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

GOETHALS, J.